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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

**No. 777**

**No. 932**

THE FIRST NATIONAL BANK IN PLANT CITY, Plant City, Florida,

and

WILLIAM B. CAMP, Comptroller of the Currency, *Petitioners,*

vs.

FRED O. DICKINSON, JR., Comptroller of the State of Florida, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## BRIEF OF RESPONDENTS
**Fred O. Dickinson, Jr., Comptroller of the State of Florida, The Hillsboro Bank, First Ruskin Bank, Peoples Bank of Lakeland**

## I.

## OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED

The sections entitled Opinions Below, Jurisdiction, and Statutes Involved contained in Petitioner Comptroller of the Currency's brief on the merits are incorporated by reference herein.

## II.

## QUESTION PRESENTED

Whether the off-premises armored car and shopping center depository operations of plaintiff National Bank are performed in contravention of federal and state branching law.

## III.

## STATEMENT[1]

In September, 1966, petitioner, The First National Bank in Plant City, ("plaintiff national bank" or "First National") began providing daily bank armored car operations in Plant City, Florida, and the surrounding trade area in Hillsborough and Polk counties (A. 63).

The armored car, described by First National as a "mobile drive-in," has a glass window and a counter on one side where customers may be served (A. 87-88, 384-85, 389; see State Banks Ex. 1, A. 117, 119 for picture). It is staffed by a driver-guard and a teller, both of whom are full-time employees of First National (A. 50, 57, 384, 389). Change is delivered and funds for deposit are received by First National at the depositors' premises via the armored car.

The armored car is owned and completely controlled by First National (A. 135-36). Plaintiff national bank bears the entire cost of its armored car operation (A. 102).

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1. The letter "A." designates references to the printed Appendix; the letter "R." identifies matters in the original record-on-appeal that are not contained in the Appendix. References to the brief on the merits of the Comptroller of the Currency are designated "C.B.," and, those to First National's brief, "B.B." All emphasis in quoted matter is supplied unless otherwise noted.

It assumes complete responsibility[2] for the monies and checks during transit (State Banks Ex. 1, A. 117, 119).

In September, 1966, plaintiff national bank also began operating an off-premises bank depository. This facility is located indoors in a shopping center mall situate about one mile from First National's main banking house. A receptacle for depositors' monies and night bags is maintained there, together with a writing table equipped with bank forms and a bench (See State Banks Ex. 1, A. 117, 118 for picture). The depository is serviced daily, without charge, by First National's armored car. The armored car teller identifies all monies and other items placed in the depository and immediately records them by depositor number (A. 53). The driver-guard verifies that all items were collected by the teller and signs the written bank record identifying the monies obtained at the depository (A. 53).

In performing its off-premises banking services, plaintiff national bank utilizes a "Comprehensive Dual Control Contract" and/or a "Messenger Transmittal Slip" (State Banks Ex. 2, A. 90, 91, State Banks Ex. 3, A. 122, 123-24). These forms state that First National is transporting the funds as "agent" for the depositor. The "Messenger Transmittal Slip" further provides that the funds "shall not be deemed to be a deposit" until delivered to the banking house.

Florida Statute Section 659.06(1)[3] requires the business of a bank to be transacted at its banking house or authorized drive-in and walk-up facilities. The operation of a drive-in or walk-up facility located anywhere other than the banking house and contiguous property is pro-

2. An insurance policy carried by First National covers the monies after they are received by the bank off-premises (A. 66).

3. Laws of Florida, Ch. 6426, §1 (1913).

hibited. FLA. STAT. §659.06(2).[4] By letter dated September 28, 1966, the Office of the Comptroller of the State of Florida advised First National that its off-premises banking operations violate Florida law (A. 23-24).

In October, 1966, plaintiff national bank filed an action against respondent Comptroller of the State of Florida ("defendant state comptroller") (A. 15-24). First National basically contended that it was not required to comply with Florida law because the off-premises banking operations are authorized under paramount federal law. The shopping center depository was alleged to be authorized by a letter dated June 29, 1966, written by regional counsel for the Comptroller of the Currency (A. 21-22). Bank armored car operations allegedly were permitted by the Comptroller of the Currency pursuant to Paragraph 7490 of THE COMPTROLLER'S MANUAL FOR NATIONAL BANKS. It provides that:

> "To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer." (A. 381-82).[5]

Respondents The Hillsboro Bank, Peoples Bank of Lakeland, and First Ruskin Bank ("defendant state

4. Laws of Florida, Ch. 28016 (1953), as amended, FLORIDA STATUTES, Ch. 276 (1965).

5. This ruling was announced by Comptroller of the Currency James J. Saxon in December, 1963, in THE NATIONAL BANKING REVIEW at 264.

banks"), three state banks serving the same trade area as First National, were permitted to intervene as parties defendant. Petitioner William B. Camp, Comptroller of the Currency of the United States ("plaintiff national comptroller" or "the Comptroller"), intervened as a party plaintiff. After the case was at issue,[6] plaintiffs filed motions for summary judgment (A. 177-89).

Defendants sought by timely interrogatories, depositions, and motions to produce to elicit facts regarding the actual, day-to-day method by which First National performed the off-premises banking operations. However, the District Court severely restricted defendants' efforts to utilize federal discovery procedures (A. 213-19). For instance, it held that defendants were entitled to discovery from only five customer-users, to be selected by First National, in order to ascertain the precise nature of the off-premises banking operations (A. 219). The District Court rendered its discovery orders on the basis of its holding that plaintiffs only needed to establish that First National's off-premises banking operations are performed in "substantial" compliance with the "theory of the operation" in order to prevail by summary judgment (A. 218). As a result of the limited discovery permitted to them, defendants were unable to determine any pattern to the off-premises banking operations.

On May 6, 1967, the District Court granted plaintiffs a partial summary judgment (A. 365-75).[7] In doing so, the District Court ignored conflicts of material fact and refused to evaluate the available factual evidence as to whether First National is receiving deposits and/or cashing checks off-premises (A. 373-74). Instead, it ruled

6. Plaintiffs' complaints are at A. 15-24, 152-61 and defendants' answers are at A. 28-47.

7. 274 F. Supp. 449.

that the contracts used by First National were "unambiguous" and that parol evidence was inadmissible as to these issues (A. 371).[8] The District Court held that the contractual documents used in the off-premises banking transactions establish as a matter of law that First National acts as agent for its customers and is not receiving deposits or cashing checks off-premises (A. 371).

In entering summary judgment for plaintiffs, the District Court expressly found that First National was cashing checks for customers off-premises (A. 374). However, the Court stated that this finding was irrelevant because First National had carried out its theory of operation "to a substantial degree" (A. 373-74). Accordingly, the Court held there was no violation of 12 U. S. C. §36 and §81 as a matter of law. Final judgment was entered against defendants on June 2, 1967 (A. 376-78).[9]

The Fifth Circuit Court of Appeals reversed,[10] holding that plaintiff national bank's armored car and shopping center depository operations constitute branch banking under 12 U. S. C. §36 (A. 400). After examining Florida Statute §659.06, the Circuit Court held that such off-premises banking activities are not authorized under Florida law (A. 408-09).

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8. These holdings were assigned as error and argued to the Court of Appeals. However, the Court did not pass upon these points in reversing the District Court's decision.

9. The District Court refused to rule upon the question of whether the off-premises banking operations are authorized as implied powers of national banks under 12 U. S. C. §24 (seventh), although this point was placed in issue (A. 376).

10. 400 F. 2d 548 (1968); A. 390-409.

## SUMMARY OF ARGUMENT

Title 12 U. S. C. §36 provides that national banks may establish branch banks only if branching is authorized under state law. A "branch" is broadly defined in section 36(f) as any bank, office, agency, additional office, or place of business where "deposits are received, or checks paid, or money lent." Florida law does not authorize branch banking. FLA. STAT. Ch. 659.

Plaintiffs contend herein that section 36(f) constitutes an "exclusive" federal definition of a "branch." The Court of Appeals held, on the other hand, that this section is a "partial, functional" definition governing the threshold determination of what off-premises banking activities by national banks constitute "branching."

*For purposes of this case, it makes no difference which construction is correct.* This is so because First National is in fact receiving deposits and cashing checks off-premises by its armored car and depository operations.

First National obtains possession of its depositors' funds away from the main banking house. It accepts responsibility for these monies as soon as it receives them off-premises. It is thereby "receiving deposits" off-premises. Further, as the District Court expressly found, First National is cashing checks off-premises (A. 374). It is therefore branch banking under the terms and intent of section 36(f).

First National seeks to avoid the express prohibitions of section 36 by using contractual devices in performing its off-premises banking services. It provides by contract that it receives the monies off-premises as "agent" for the depositors and that the monies are not "deemed to be deposits" until brought by First National to the banking house.

The sole purpose of these contracts is evasion of the federal branch banking law. Although deposits are a mat-

ter of contract, it is well-settled that a bank and its depositors cannot "contract around" statutory law or policy. 5A MICHIE, BANKS AND BANKING §1 at 13; 10 AM. JUR. 2d *Banks* §338 (1963); 9 C.J.S. *Banks and Banking* §267 at 547 (1938). Further, this court has consistently refused to permit such contractual evasion of statutes. *United States* v. *City of San Francisco*, 310 U.S. 16 (1940); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). Accordingly, the Court of Appeals properly held that First National could not avoid the statutory branching provisions by means of such "paper evasions" (A. 406-07).

The legislative history of the federal branching act[11] demonstrates that off-premises banking operations such as those performed here by First National were intended by Congress to be prohibited to national banks as branch banking unless authorized under state law.

Prior to passage of the McFadden Act, national banks were performing exactly the same off-premises banking services now performed by First National. Such limited off-premises banking operations had been ruled by the Attorney General of the United States to be lawful ancillary activities of national banks rather than illegal branch banking. 29 OP. ATT'Y GEN. 81 (1911). Congress clearly expressed its belief that, contrary to the opinion of the Attorney General, such off-premises banking activities in fact amounted to branch banking. It, therefore, provided in the McFadden Act that off-premises agencies and places of business affording even one banking service, such as the receipt of deposits, is included within the definition of a "branch".

The Comptroller's assertion that Congress was concerned with expanding the ability of national banks to compete effectively with state banks and not with cut-

11. The McFadden Act, 44 Stat. 1228-29 (1927), as amended, 12 U.S.C. §36(c) (1964).

ting back on off-premises services then being performed by national banks is premised on an erroneous assumption.

In the McFadden Act, Congress enlarged the powers of national banks to perform such off-premises banking services, but it did so *only* to the extent that state banks were granted this power under state law. At the same time, Congress restricted the performance by national banks of off-premises branching services, including those services then being performed on the alleged authority of the Attorney General's opinion, if state law prohibited such activities by state banks.

Congress adopted state branching law as the standard for national banks pursuant to a policy of competitive equality. *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). It was thereby following the policy of equalization that it had early adopted in the National Bank Act in connection with important competitive banking functions such as obtaining deposits.

The Comptroller's argument that there is no overriding policy of competitive equality as to "all" off-premises activities of national banks is misdirected here. The off-premises banking operations of First National involve the functions of receiving deposits and cashing checks, the exact services defined in section 36(f) as branch banking.

Plaintiffs ignore both the Congressional intent in enacting the federal branching act and the fact that, as the Court of Appeals held, First National has attempted to evade that intent by contractual subterfuges. Instead, they rely solely on legal niceties in asserting that First National is not receiving deposits or cashing checks off-premises. However, the McFadden Act is not concerned with legalisms. It is concerned with the vital banking

functions of obtaining possession and control of monies from depositors and disbursing funds to the public. Congress intended therein to equalize the ability of state and national banks to perform these important functions away from the banking house.

First National is now performing off-premises precisely those crucial banking services that Congress intended to restrict in the McFadden Act. It should not be permitted to evade the federal branching act by contractual subterfuge. The judgment of the Court of Appeals should be affirmed for this reason alone.

Plaintiffs urge that the Court of Appeals erroneously held that state branching law solely determines what activities of a national bank constitute branch banking. They assert that such a holding permits the states to potentially prohibit "all" off-premises banking activities of national banks by defining them as branch banking.

Defendants submit that a fair reading of the decision below establishes that the Court of Appeals did not so hold. Instead, the Court of Appeals held that section 36(f) provides a broad, functional test of a "branch" that initially determines whether the activity of the national bank comes within the McFadden Act. If this purely federal threshold test of a "branch" is met, then state branching law becomes applicable to the off-premises banking activity performed by the national bank.

In any event, if the language of the Court of Appeals lacks precision in this regard, this can be easily corrected. There is no need to reverse the judgment itself in order to do so.

The construction adopted by the Court of Appeals is consistent with the language and the legislative history of the McFadden Act. In section 36(f), Congress specifically

couched its definition of a "branch" in broad, functional terms. Further, Congress stated only that the definition "shall be held to include" the activities set forth therein. The legislative history additionally demonstrates that Congress intended this section to be a partial, functional definition of a "branch" rather than an exclusive definition, as urged by the Comptroller.

The Court's approach provides a workable and practical rule that is completely consistent with federal branching policy. It precludes arbitrary state action since the federal courts have the final say as to whether any particular off-premises activity of a national bank is a "branch" under section 36(f). At the same time, it recognizes "branching" as a practical, functional matter and thereby precludes arbitrary action by the national Comptroller on the basis of legalisms such as those relied on here.

One last point must be mentioned. Although final judgment can be properly affirmed for defendants, final judgment *cannot* be entered for plaintiffs on the basis of the record herein. If the holding of the Court of Appeals that the off-premises banking operations of First National constitute illegal branch banking is reversed, there are material issues of fact that must first be resolved before final judgment can be entered for plaintiffs.

## ARGUMENT

### I. Plaintiff National Bank Is Receiving Deposits and Cashing Checks Away from Its Main Banking House in Violation of 12 U.S.C. §36.

Section 36(f) defines a branch as those places away from the main banking house where "deposits are received, or checks paid, or money lent." The off-premises banking operations of First National include the receipt of deposits

and cashing of checks away from the banking house. Therefore, First National is branch banking within the express terms of the federal definition of a branch.

A. THE LEGISLATIVE HISTORY OF THE FEDERAL BRANCHING ACT ESTABLISHES THAT OFF-PREMISES BANKING OPERATIONS OF THE NATURE PERFORMED HEREIN BY FIRST NATIONAL WERE INTENDED BY CONGRESS TO BE DEFINED AS BRANCH BANKING AND ENCOMPASSED BY THE PROVISIONS OF SECTION 36.

A review of the legislative history of the federal branching act demonstrates the positive and unequivocal Congressional intent to prohibit off-premises banking operations by national banks, such as those performed herein by First National, unless permitted to state banks under state law.

1. *Off-premises banking prior to 1927.*

Prior to 1927 and passage of the McFadden Act, national banks had no legal power to branch bank except under certain exceptions specified by Congress. *First National Bank* v. *Missouri,* 263 U.S. 640 (1924). Nevertheless, national banks were performing a variety of banking services, ranging from the receipt of deposits to a full banking business, at places away from the main banking house. As a result, it was apparent to Congress that national banks were widely and freely branching through various subterfuges. 66 CONG. REC. 1577, 1632, 1779, 4410 (1925).

Although the legality of these off-premises banking operations was doubted by most Congressmen,[12] they were explicitly authorized by the Comptroller of the Currency. 66 CONG. REC. 4432-33 (1925). This was ostensibly

12. See, for instance, 65 CONG. REC. 11298 (1924); 66 CONG. REC. 1578 (1925); 67 CONG. REC. 2841, 3230 (1926); 68 CONG. REC. 3822 (1927).

done in order to allow national banks to compete with state banks in those states authorizing branch banking. However, off-premises banking operations were also performed by national banks in states prohibiting branching. 66 CONG. REC. 1577, 4434 (1925).

The basis for the Comptroller's authorization of such off-premises banking operations was a 1911 opinion of the United States Attorney General. 29 OP. ATTY. GEN. 81. It is this same opinion which plaintiff Comptroller heavily relies upon here (C.B. 17, 29). In this opinion, the Attorney General relied upon *inter alia, Bank of Augusta* v. *Earle,* 38 U.S. (13 Pet.) 519 (1839) and *Merchants' Bank* v. *State Bank,* 77 U.S. (10 Wall.) 604 (1870),[13] also relied upon by plaintiff Comptroller here (C.B. 16). The Attorney General concluded that national banks could "maintain an agency, the power of which is restricted to dealing in bills of exchange, or possibly to some other particular class of business incident to the banking business." *Id.* at 86. It was accordingly held that national banks could appoint agents to "receive and forward to it at its place of business the money of persons who desire to deposit with it." *Id.* at 90.

The Attorney General ruled that the establishment of such off-premises agencies did not constitute a branch, which he characterized as a separate bank that performs all aspects of the banking business. *Id.* at 88. However, he cautioned that "'*nominal establishment of agencies might easily result in the practical establishment of a net-*

13. In these decisions, the United States Supreme Court recognized that some business of every bank is "unavoidably done at the proper place" away from its office by its employees or agents. *Merchants' Bank, supra.* In *Merchants' Bank, supra,* the power of the national bank to pay for gold at the place where it was purchased was upheld. In *Bank of Augusta, supra,* the right of a bank to purchase and discount bills of exchange away from the banking house was sustained.

*work of branch banks throughout the home State or in other States.'"* *Id.* at 88. This is exactly what was to happen.

In 1924, the United States Supreme Court held that national banks had no express or implied power to branch bank. *First National Bank* v. *Missouri,* 263 U.S. 640 (1924). The 1911 opinion of the Attorney General was cited for this proposition. The Court specifically disapproved a subsequent opinion that national banks could establish off-premises offices for the performance of such services as the receipt of deposits and cashing checks. *Id.* at 658, *citing* 34 OP. ATTY. GEN. 1 (1923).

The Comptroller of the Currency continued to rely upon the Attorney General's 1911 ruling that agencies for limited banking services did not constitute branching. He interpreted the *Missouri* case as "having application only to branch banks which do a complete banking business, and not to branch banks which only receive deposits and cash checks. . . ." 66 CONG. REC. 1577 (1925). Therefore, he still authorized the operation by national banks of off-premises agencies and teller's windows where limited banking services, such as the receipt of deposits and cashing of checks, were provided. *Id.* Included among such off-premises banking services were various armored car operations.

Thus, prior to enactment of the McFadden Act, national banks were performing precisely the same off-premises banking services as are involved in the instant case. It was then contended, just as it is now, that such limited off-premises banking operations did not constitute branch banking but rather were lawful, incidental powers of national banks.

2. *The McFadden Act.*

It was clear to Congress that there was a conflict among the opinions of the Attorney General, the decision of the Supreme Court in the *Missouri* case, and the fact that the Comptroller of the Currency was authorizing national banks to perform various banking services off-premises. 66 CONG. REC. 1777 (1925). It was equally clear that the legal inability of national banks to branch in states permitting branch banking placed those national banks at a severe competitive disadvantage. H. R. Doc. No. 90, 68th Cong., 1st Sess. 6 (1924). Accordingly, Congress concluded it should affirmatively determine the rights of national banks to branch bank. 66 CONG. REC. 1777 (1925).

In 1927, Congress enacted the McFadden Act. National banks were authorized therein to branch bank if state banks were permitted to do so under state law. The term "branch" was defined as including any bank, office, agency, additional office, or place of business at which deposits are received, checks paid, or money loaned.[14]

The Comptroller of the Currency now contends that the McFadden Act incorporates the definition of a "branch" set forth in the 1911 opinion of the Attorney General (C.B. 28-29). He asserts that Congress defined a "branch" as a bank performing all aspects of the general business of banking (C.B. 28-29). Congress allegedly did not consider the off-premises performance of individual banking functions, such as those involved here, to constitute branching but instead affirmed that such operations were "lawful ancillary activities" of national banks (C.B. 20-21).

14. This statutory definition has never been amended.

The Comptroller's contention is not tenable in light of the branch banking provisions adopted by Congress and the legislative debates thereon.

The very words of the McFadden Act demonstrate that limited off-premises banking operations are encompassed by the branching provisions of section 36. Contrary to the Comptroller's contention, Congress expressly defined a branch as including a place where only one banking function—either receiving deposits, or cashing checks, or making loans—may be performed. 12 U. S. C. §36(f). Further, Congress' use of the word "include" in section 36(f) indicates its intent to provide a broad definition encompassing off-premises facilities for limited but important banking functions, as well as a branch performing the general banking business.

The provisions of section 36(f) establish Congress' rejection of the Attorney General's 1911 ruling that a limited bank operation for the receipt of deposits or cashing checks is not branching. Certainly Congress did not define a "branch" in terms of the performance of a general banking business, which was the definition used by the Attorney General in his opinion and which is now urged by the Comptroller here.

Legislative debates emphasize that Congress fully intended to include the performance of limited off-premises banking services in the definition of a "branch."

As previously noted, national banks were branch banking prior to passage of the McFadden Act. In some instances, the branches provided all general banking services. 66 CONG. REC. 4434 (1925). However, other branches performed only one or two banking functions.

Senator Pepper declared that national banks were branch banking[15] by establishing:

> "what are called tellers' windows, where a limited amount of business is done *in respect of the receipt of money and the cashing of checks.* . . ." 66 CONG. REC. 4410 (1925).[16]

Congressman Lozier similarly noted that, in many states, the "so-called branch banks are merely 'tellers' windows' where deposits are received and money paid out, but where no other business is transacted." 66 CONG. REC. 1764 (1925). Representative Kurtz observed that "usually these branches only exist for the purpose of receiving deposits." 67 CONG. REC. 2855 (1926).

Recognizing that national banks were then freely performing limited, off-premises banking functions, just as first national is now doing, Congress expressed its intent to regulate and restrict such activities as branch banking. 67 CONG. REC. 2855 (1926).

This precise point was discussed by Representative Stevenson:

> "you have branches in the Federal reserve system established by the dictum of the Comptroller of the Currency, who has assumed to say that he can allow a national bank to establish as many agencies for re-

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15. Congressman La Guardia emphatically declared that:

"The law is being violated every time the comptroller gives a certificate for one of these teller windows. It is [not—sic] even an attempt to get around the law; it is a crude and outright violation of the law." 67 CONG. REC. 3230 (1926).

Congressman Morrish characterized tellers' windows as "subterfuge branch banks." 66 CONG. REC. 927 (1924).

16. The off-premises banking operations involved here are essentially the same as the teller's windows. The armored car service of First National is simply a mobile teller's window. The shopping center depository is essentially a mechanical teller's window. The same basic banking functions of getting monies for deposit from the public and/or paying out monies to the public are performed in both instances.

> ceiving deposits and paying checks as he sees fit. . . . *I will show presently that we cut that out, root and branch.*" 66 CONG. REC. 1627 (1925).

After quoting the definition of a "branch" contained in the McFadden Act, Representative Stevenson declared that "you take away from the comptroller the right to say that banks can maintain offices at which they can pay checks and receive deposits." 66 CONG. REC. 1628 (1925). Senator Pepper similarly observed that *"the definition of a branch contained in one of the sections of the bill is broad enough to include the so-called teller's window, or something of that sort, which would not be a branch bank within the meaning of the [Missouri] decision of the Supreme Court."* 67 CONG. REC. 8296 (1926).

In referring to the spread of the teller's windows, Representative Stevenson declared that "we stop that very thing. . . ." 67 CONG. REC. 2860 (1926). Representative Black stated that "I do not approve of the teller window proposition, and this bill prohibits any further exercise of that power." 67 CONG. REC. 3238 (1926).

Representative Williamson, in discussing the intent of the proposed branching bill, stated that "the bill will *also* put an end to the establishment of teller windows, offices, and agencies, that is now being done all over the country by national banks even in those States prohibiting branch banking." 67 CONG. REC. 3232 (1926). Representative Nelson flatly characterized "branch banks, 'additional offices' or 'agencies,' or whatever may be the form of the transgression" as illegal branch banking. 67 CONG. REC. 2841 (1926).

Clearly Congress restricted such limited banking operations of national banks as branching. Nevertheless, these same off-premises banking services, albeit in more modern form, are now being performed by national banks.

Plaintiffs argue that Congress defined a branch solely in terms of a place where the legal debtor-creditor relationship is finalized in connection with the banking operations of receiving deposits, cashing checks, or making loans. In this connection it is argued that the definition of "deposit" expressly set forth in the Banking Act of 1935,[17] dealing with the Federal Deposit Corporation, establishes the meaning of "receiving deposits" in the federal branching act of 1927.[18]

Such a construction is not consistent with the terms and policy of the McFadden Act.

All deposits may be divided into two classes, namely, special and general. *Marine Bank* v. *Fulton Co. Bank,* 69 U.S. (2 Wall.) 252, 256 (1865). A "general" deposit is predicated upon a debtor-creditor relationship whereas a "special" deposit creates a principal-agent relationship between the bank and its customers. *Id.*

The McFadden Act defined a branch in terms of, *inter alia,* a place where deposits are received. No distinction was made therein between "general" and "special" deposits.

On the other hand, the definition of "deposit" used in the 1935 F.D.I.C. act specifically encompassed only "general" deposits. That act dealt with federal insurance of deposits. It was concerned with the technical *liability* of banks for their deposits, a matter directly related to the legal formation of a debtor-creditor relationship. For purposes of insuring deposits, Congress made a debtor-creditor relationship the determining factor of a "deposit."

17. 49 Stat. 685-86, 12 U.S.C. §1813.

18. Certainly this 1935 statute is no part of the legislative history of a much earlier and entirely different statute. *NLRB* v. *Lion Oil,* 352 U.S. 282 (1957).

There is a logical reason why the McFadden Act contains no such restrictive definition of "deposits." The federal branching act of 1927 was not concerned with the legal liability of the banks for deposits. It was concerned with the off-premises performance of mainstream banking functions involving the acquisition and control of the funds of depositors. This function is performed when the bank obtains control of the monies, regardless of whether the monies are technically characterized as "general" or "special" deposits.

Representative McFadden consistently stressed that the definition of a branch bank contained therein defined branching in terms of *"service."* 66 CONG. REC. 1645, 1767, 1770, 1778 (1925). After passage of the act, he stated that a branch was defined as "[a]*ny* place outside or away from the main office *where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office*. . . ." 68 CONG. REC. 5816 (1927). The performance of banking services off-premises does not depend upon immediate, legal consummation of the debtor-creditor relationship. It depends only upon the *functional* performance of a basic service off-premises. The legislative history simply is not consistent with plaintiffs' narrow focus on a technical creation of the debtor-creditor relationship in banking transactions as the definitive characteristic of a branch.

The possible convenience afforded to bank customers by the availability of off-premises banking services was recognized by Congress. However, Congress did *not* resolve the branching question pursuant to such considerations. It looked to more basic concerns. Recognizing that the power of a bank to perform important banking services off-premises constitutes a significant competitive

advantage, Congress resolved the matter by equalizing this competition between state and national banks.

Accordingly, Congress did enlarge the powers of national banks to perform off-premises banking operations,[19] but *only* to the extent necessary to permit them to compete with state banks that could branch. At the same time, Congress prohibited such practices by national banks, including those limited off-premises banking operations theretofore permitted by the Comptroller of the Currency, if state banks were not permitted under state law to perform them.[20]

Representative Celler stated in this regard that:

> "We have seen what the Comptroller of the Currency has done with reference to wholesale granting of teller-window applications to banks in the city of New York and in the city of Washington. *We must circumscribe the powers of opening branch banks; but if you are going to fix any powers, see to it that they shall apply equally to national banks as well as State member banks.*" 67 CONG. REC. 3241 (1926).

Representative Williams cogently summed the matter up by stating that it was only proposed *"to give to national-banks the opportunity of legitimately meeting competi-*

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19. It is true, as argued by the Comptroller, that Congress intended in the McFadden Act to enlarge certain other powers of national banks in order to permit them to carry on a "full-fledged and efficient modern banking business" (C.B. 20-21). However, these powers in no way relate to off-premises banking operations such as those herein. 67 CONG. REC. 2828-29 (1926). And, even in connection with those powers, Congress applied a policy of enlarging the powers of national banks *only* to the extent necessary to establish competitive equality between state and national banks. 67 CONG. REC. 2828 (1926); 68 CONG. REC. 5815 (1927).

20. Representative Watkins noted that the bill "circumscribes and curtails the present facilities and fields for branch banking. . . ." 66 CONG. REC. 1775 (1925). Similarly, Representative Williamson emphasized that the McFadden Act "clearly restricts the present branch banking privileges of national banks." 66 CONG. REC. 1756 (1925).

*tion in those States where that kind of competition exists. . . .*" 66 CONG. REC. 1634 (1925).

In 1933, various amendments were made to the McFadden Act.[21] National banks were given the power to engage in state-wide branching but only if this was authorized by state statute law and subject to state law. 12 U. S. C. §36(c)(2).[22] Representative Luce, a member of the Conference Committee, reported to the House that:

> "it is not, however, here proposed to give the advocates of branch banking any advantage. *We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches.*" 77 CONG. REC. 5896 (1933).

The power of national banks to perform off-premises banking operations was thus enlarged and, at the same time, restricted in the McFadden Act by adopting state branching law as the standard for national banks.

In determining that the off-premises banking operations of First National constitute branch banking, the Court of Appeals took cognizance of this statutory policy.[23] The Court concluded that, in view of the Congressional intent to establish competitive equality, "if we construed Section 36(f) as permitting paper evasions from state anti-

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21. 48 Stat. 189-90, 12 U.S.C. §36(c) (1933). The Comptroller of the Currency and some Congressmen had strongly pushed for statutory authorization of state-wide branching powers for national banks regardless of state branching restrictions. Senate Bill 4412, commonly called the Glass Bill; *see* 75 CONG. REC. 9986 (1932) and 76 CONG. REC. 1449 (1933). However, Congress refused to go along with this proposal.

22. The legislative history of these amendments is extensively reviewed in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966).

23. In contrast, the District Court did not in any way consider this policy of competitive equality in entering its summary judgment for plaintiffs (A. 373).

branching laws, we would be letting the left hand give and the right hand take away." (A. 407).

The Comptroller now attacks the Court's deference to this Congressional policy, asserting that "the goal of equality that the court of appeals sought to serve is chimerical. . . ." (C.B. 10). He summarily dismisses the policy of "competitive equality" as a "catchy" phrase and "slogan" (C.B. 15, 21). Such arbitrary disregard of Congressional policy is unwarranted.

Congress clearly intended to insure competitive equality in branch banking between state and national banks by the McFadden Act. *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). In so doing, Congress was simply continuing "its policy of equalization first adopted in the National Bank Act of 1864." *Id.* at 261.[24]

The policy of competitive equality has been particularly honored in connection with vital banking functions such as obtaining deposits.[25] For instance, in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934), the question arose whether a federal statutory provision authorizing a national bank to "give security" for state deposits contemplated a pledge of specific assets or a general lien upon the bank's assets. State banks were empowered

24. Congress early decided upon a general "policy of equalization" by adopting state law as the standard for national banks in most of the important competitive areas. In addition to specifically applying state law to national banks in many instances, Congress did not occupy the field so as to preclude the application of state laws that do not conflict with federal law to national banks. *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944); *First National Bank* v. *Missouri*, 263 U.S. 640 (1924); *McClellan* v. *Chipman*, 164 U.S. 347 (1896).

25. Pursuant to this policy, Congress has prohibited national banks from paying a greater rate of interest on time and savings deposits than the maximum rate authorized by state law. 44 Stat. 1224-25, 12 U.S.C. §371 (1964). *See also, Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944), where this Court held that state law was controlling as to deposits of national banks in the absence of conflicting federal law.

to provide a general lien, which constituted the more impressive security. This Court held that national banks could provide the general lien because of the "policy of equalization" that Congress had adopted in the National Bank Act. In so holding, the Court recognized that "without such power national banks would not in Georgia be upon an equality with state banks in *competing for deposits*." 292 U.S. at 564-65.

The Comptroller argues, however, that the Congressional concept of competitive equality was narrowly limited to the branch banking powers and that national banks are not intended to be "exact facsimiles" of state banks with regard to all banking powers (C.B. 15).

In arguing that there is no overriding principle of competitive equality that limits *all* off-premises services of national banks to those state banks can provide, *the Comptroller misses the whole point of this case.* The issue here is not whether national banks can perform new business solicitation, credit card services, various correspondent services, and the like, off-premises. The issue here is whether national banks can perform off-premises banking activities involving the heart of banking, namely, the receipt and control of money, and whether contractual devices and subterfuges can be employed to evade the Congressional definition of branching, thereby frustrating a national policy.

The legislative history of section 36, and particularly that relating to teller's windows and agencies for the receipt of deposits or cashing of checks, demonstrates that First National is performing off-premises banking services considered by Congress to be branch banking. Plaintiff national bank is operating at a substantial competitive advantage in the fundamental banking areas of receiving monies for deposits and making monies available to the

public. If First National were not utilizing its so-called "deposit" and "agency" contracts, the off-premises armored car and depository bank operations would be peremptorily prohibited as illegal branch banking. The Congressional policy of equalization should control the determination of whether First National can perform these operations by indirection and contractual artifice.

B. Prior to Comptroller James J. Saxon's Ruling in 1963, the Comptroller of the Currency Had Long Ruled That Off-Premises Banking Operations Such As Those Performed Here by First National Constitute Branch Banking under Section 36.

Comptroller Saxon's ruling that off-premises armored car and depository operations do not constitute branch banking is directly contrary to the long-standing administrative practice of the United States Comptroller.

Prior to 1949, the Comptroller of the Currency had no general rule regarding the use by national banks of armored cars to receive deposits, deliver monies, and perform other banking services. The legality of such off-premises banking operations was simply determined on a case by case basis. An important factor in each case was whether state banks were allowed to perform such off-premises operations (R. 1441).

Around 1938, the Comptroller of the Currency made a ruling particularly significant to this case. A national bank in Miami, Florida, was using an armored car to pick up deposits from customers as far away as Homestead, some 40 miles from Miami. The Comptroller of the Currency required the national bank to stop its armored car operation because Florida law[26] prohibits branch banking. American Banker, November 14, 1957.

26. Since 1913, Florida Statute Section 659.06 has required the banking business of a state bank to be performed at its banking house.

By 1949, the Comptroller of the Currency was consistently ruling that the pick-up of deposits and the cashing of checks by a national bank armored car constituted branch banking (R. 1471). On the other hand, there was considered to be no branch banking if the armored car service was performed by *"some other party* who is acting as agent for the depositor *so that the bank would not take possession of the currency and checks until the same have actually been received at the banking premises."* (R. 1459).

In enforcing this ruling, the Comptroller of the Currency made it abundantly clear that no fictitious agency relationship could be employed to frustrate the law. There had to be a true agency or independent contractor relationship between the bank customer and the armored car service (R. 1472). For instance, in 1953, it was held that, if the armored car service acts as representative of the bank or is compensated by the bank, there would be an "illegal branch banking activity" since the service would be acting as agent for the bank (R. 1466).

In late 1963, Comptroller Saxon reversed this long-standing position. He ruled that, regardless of federal or state branching law, a national bank could pick up deposits and perform other banking services off-premises by using an agreement stating the bank was acting as agent for the customer.

This construction, made some thirty-six years after enactment of the McFadden Act, is absolutely unique. It is not based upon any factors reflecting the Comptroller's specialized experience or specific investigations. *Cf. Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139 (1944). It simply reflects the philosophy of an administrative official seeking to override the expressed intent of Congress. It is in no way entitled to be given controlling weight.

### C. Plaintiff National Bank Is Receiving Deposits Off-Premises in Violation of Section 36.

Plaintiffs argue that a deposit is a purely contractual relationship and that a bank has the absolute right to contract with its customers regarding deposits. It is contended that First National is not receiving deposits off-premises because it utilizes contractual documents providing that the monies are received by the bank off-premises as agent for the depositors and that these funds are not deemed to be deposits until they reach the banking house.

The District Court accepted this contention. It held that the question whether First National is receiving deposits or cashing checks away from its banking house is resolved as a matter of law by First National's deposit and agency contracts (A. 371).

The District Court did *not*, as stated by both plaintiffs,[27] resolve this question on the basis of depositions or other factual evidence relating to the performance of the off-premises operations. On the contrary, the Court explicitly disregarded this conflicting evidence and held that such evidence was irrelevant (A. 371, 374). The District Court entered a summary judgment for plaintiffs solely on the basis of the "unambiguous" contracts used by First National in its off-premises banking transactions. In so doing, it erred in summarily ruling on disputed facts and excluding parol evidence. Moreover, it improperly rejected defendants' arguments of subterfuge and violations of public policy. Further, it disregarded its own factual finding that First National was cashing checks off-premises.[28]

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27. C.B. 5, 42; B.B. 9, 24.

28. Defendants raised the error of these rulings before the Court of Appeals, asserting, *inter alia*, that there was conflict of material fact and that the parol evidence rule applies only to parties to the contract or their privies, and not to a stranger thereto like defendants here. *Scofield* v. *Greer*, 185 F.2d 551 (5th Cir. 1950); *Patterson* v. *Texas Co.*, 131 F.2d 998 (5th Cir. 1942), *cert. denied*, 319 U.S. 761 (1943).

The Court of Appeals rejected the District Court's conclusion that the contracts of First National establish it is not branch banking (A. 400). The contention that First National "has not established offices or agencies, where, as specified in Section 36(f), 'deposits are received, or checks paid, or money lent' " was succinctly dismissed by the Court of Appeals as "indefensible." (A. 400). The Court subsequently observed that "we cannot aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language." (A. 406). Recognizing that Congress intended to insure competitive equality in the branch banking area by adopting state law as the standard for national banks as well as state banks, the Court of Appeals refused to condone "paper evasions" of the branch banking laws (A. 407).

The decision of the Court of Appeals to look to substance rather than form in deciding that First National is receiving deposits or cashing checks off-premises is consistent with established law.

1. *The contracts of First National are subterfuges used for the purpose of evading federal branching law and were properly disregarded by the Court of Appeals.*

Deposits are clearly a matter of contract, and a bank and its customers may contract as to their relationship and respective rights. However, as urged before the Court of Appeals, this principle is subject to a well-established limitation that a bank and its customers may *not* "contract around" statutory prohibitions or public policy. 10 AM. JUR. 2d *Banks* §338 (1963); 9 C.J.S. *Banks & Banking* §267 at 547 (1938); 5A MICHIE, BANKS & BANKING §1 at 13. This limitation is controlling here.

Throughout this litigation, it has never been suggested by plaintiffs that First National's contracts are used for any

purpose other than evasion of the federal branch banking law.[29] Indeed, Comptroller Saxon has stated that the so-called "agency" and "deposits" contracts are required under paragraph 7490 in order to avoid the prohibitions of section 36 (R. 1493).

The United States Supreme Court has consistently refused to sanction evasion of statutory provisions or policy by means of contractual subterfuges.

In *United States* v. *City of San Francisco*, 310 U.S. 16 (1940), this Court reviewed a federal statute that granted governmental lands to cities for power projects. The statute expressly prohibited cities accepting such lands from selling or letting the right to sell the electric energy produced thereon. The City of San Francisco received a land grant pursuant to this statute. It then "consigned" the power produced on the land to a private utility, for subsequent sale and distribution as "agent" of the City. In finding a statutory violation, the Court held that terminology of consignment rather than sale of the power and "verbal description of the power Company as the City's agent" did not take the parties' action out of the statute. The Court concluded that:

> "The City has in fact followed a course of conduct which Congress, by Section 6, has forbidden. *Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law.*" *Id.* at 28.

*See also, Bartels* v. *Birmingham*, 332 U.S. 126 (1947).

The point is perhaps most succinctly stated in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964):

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29. The contracts serve no legitimate business purpose. For example, they do not contain any provision limiting the bank's liability for the funds, as do deposit contracts for funds placed in night depositories.

> "To allow Union Oil to achieve price fixing in this vast distribution system through this 'consignment' device would be to make legality for antitrust purposes turn on clever draftsmanship. *We refuse to let a matter so vital to a competitive system rest on such easy manipulation.*" *Id.* at 24.

The overriding policy of the federal branching act is one of competitive equality between state and national banks. Like the policy of free competition in the antitrust laws, this policy of equal competition should not depend on "clever draftsmanship."

The holding of the Court of Appeals below is also consistent with a number of decisions that have struck down various devices to avoid statutory prohibitions of branch banking. In *Whitney National Bank* v. *Bank of New Orleans & Trust Company*, 323 F.2d 290, 301 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965), the Court of Appeals for the District of Columbia found a branching operation, holding that "[t]he nature of the arrangement, and not the label applied to it, determines the character of the relationship between two banking institutions." Accord: *First National Bank* v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962); *Marion National Bank* v. *Saxon*, 261 F. Supp. 373 (N.D. Ind. 1966); *Continental Bank and Trust Co.* v. *Taylor*, 14 Utah 2d 370, 384 P.2d 796 (1963); *Thrift, Inc.* v. *State Bank & Trust Co.*, 298 Ill. App. 501, 19 N.E.2d 126 (1939).

Defendants submit that, as the Court of Appeals held, the so-called "agency" and "deposit" agreements utilized by First National are purely subterfuges to evade the federal branching statute. They should not be judicially approved. Any other holding would ignore the realities of the situation.

Factually, First National does receive deposits at its armored car and shopping center depository.

For example, plaintiff national bank obtains possession and control of its depositors' funds in the regular course of its business of banking away from the banking house. As in any other deposit transaction, responsibility for the monies is assumed by plaintiff national bank as soon as it obtains possession thereof.

Further, although plaintiffs consistently characterize the off-premises banking operations as a "messenger service" in their briefs here, they previously had no difficulty in recognizing that First National is in essence receiving deposits off-premises. Each of the plaintiffs has characterized the funds that the bank receives off-premises as "deposits." Paragraph 7490, *The Comptroller's Manual for National Banks,* refers to "deposits collected" by the bank armored car (A. 381). Similarly, in announcing the establishment of its off-premises banking services, the president of First National explained that:

> " 'First National will send this car to all of its commercial customers to *collect deposits.*
>
> 'Individuals may also *place deposits* in this car for transmittal to the bank' " (A. 385)

Without exception, the customers of First National referred to the monies which they delivered to the off-premises bank armored car employee or placed in the shopping center depository as "deposits." (A. 221, 231, 275, 280, 302, 307, 318, 329, 333).

Every aspect of First National's off-premises armored car and depository operations directly relates to the functional receipt of deposits by the bank. It accepts possession of, and responsibility for, monies of its depositors. It does so for the sole purpose of crediting these funds to the depositors' accounts with First Na-

tional. The monies received by First National off-premises are, of course, invariably credited to the depositors' accounts.

The "deposit" and "agency" contracts are used solely in order to permit First National to perform by indirection branching operations expressly prohibited to it under federal statute. Hence, these contracts frustrate federal and state branching laws and policy. The Court of Appeals below properly refused to permit First National to avoid statutory branching prohibitions by such "paper evasions."

2. *First National is receiving deposits by its off-premises armored car and shopping center depository operations within the meaning and intent of the federal branch banking act.*

Plaintiffs ignore defendants' contention, and the holding of the Court of Appeals, that the "agency" and "deposit" contracts used by First National are subterfuges to evade branch banking law. Instead, they resort to legalisms in dealing with federal branching provisions and policy. No such approach was ever contemplated by Congress.

Plaintiffs ignore the fact that the federal branching act deals with practical matters of control and disposition of money. It is concerned with the basic banking functions of obtaining possession of the depositors' monies and disbursing monies to customers. In the McFadden Act, Congress equalized the ability of state and national banks to perform these fundamental banking activities at places other than the main banking house.

The McFadden Act is not concerned with banking legalisms. It does not incorporate the technical approach to banking transactions that is generally employed by legislatures and courts in dealing with a bank's liability for monies. For instance, unlike the F.D.I.C. act, the McFadden

Act does not contain a definition of a "deposit" in terms of the debtor-creditor relationship (*Supra* at 19). Congress knew how to define a branch in legalistic terms if it had so desired. There is nothing in either the language or the legislative history of the McFadden Act demonstrating that Congress intended to narrowly limit the federal definition of a branch to facilities where a debtor-creditor relationship is established.

In the instant case, the issue is [illegible] First National is receiving deposits off-premises. This issue must be evaluated in the context of the McFadden Act.

The cases relied upon by plaintiffs are *not* relevant here. The cases deal only with the legal issue of when a debtor-creditor relationship arises for purposes of determining the bank's liability for monies. No case has been cited dealing with "receipt" of deposits, either in the context of the McFadden Act or any other context.

Receipt is a physical fact. It is clearly established here. The only remaining question is *who* is receiving the deposits.

Plaintiffs argue that First National is not "receiving deposits" off-premises because it receives the monies as "agent" for the depositor (B.B. 29; C.B. 43). It is asserted that this "agency" relationship obviates any expression of consent by First National to the creation of the status of debtor and creditor at the time it takes physical possession of the funds from its depositors (C.B. 43). Plaintiffs conclude, therefore, that the monies received by the First National as "agent" are not deposits.

This contention is premised upon plaintiffs' assertion that Congress intended to narrowly define a "branch" in legalistic terms relating to the formal debtor-creditor relationship. Plaintiffs again improperly rely upon legal-

isms in this case. As previously noted, the federal branch banking act is not concerned with legal technicalities, but rather with the off-premises performance of the life-blood functions of banking: obtaining control of monies from depositors and making monies available to customers.

Even if plaintiffs were correct in asserting that the debtor-creditor relationship is the determining indicia of a branch, their argument fails for another reason. The "agency" relationship, which allegedly prevents a debtor-creditor status from arising between First National and its depositors when the monies are received by First National off-premises, does *not* exist in law or in fact.

An agency relation does not exist merely because the parties verbally characterize their relationship as such or even because they honestly intend to create such a relation.[30] *Crowe* v. *Hertz Corp.*, 382 F.2d 681 (5th Cir. 1967); RESTATEMENT (SECOND) OF AGENCY §1 at 8 (1957); 2 C.J.S. *Agency* §2 (1936); 3 AM. JUR. 2d *Agency* §21 (1962). Whether a particular relationship is an agency depends on the factual relations of the parties *as they exist*, without regard to what the parties call their relationship. In *Crowe*, 382 F.2d at 688, the Court of Appeals stated that, if a party could conclusively establish the existence or non-existence of an agency relationship by his own statements, then:

> "a large function of the fact finder's role in the decisional process would be eliminated. It would be tantamount to a rule that if Party A swears he was not *negligent*, then Party B could not prove A's negligence by circumstantial evidence." (Court's emphasis).

30. It is for this reason, *inter alia*, that the District Court erred in treating the contracts of First National as "unambiguous," rejecting parol evidence, and refusing to resolve agency as a fact. The point was assigned as error to the Court of Appeals which did not decide it as an evidentiary matter but tacitly disapproved the District Court's holding by finding the contracts to be "paper evasions."

No characteristic of an agency relationship exists here between plaintiff national bank and its customers.

One characteristic is the agent's power to bring about business relations between his principal and third persons. *Esmond Mills* v. *C.I.R.*, 132 F.2d 753 (1st Cir.) *cert. den.*, 319 U.S. 770 (1943); 3 AM JUR. 2d *Agency* §3 (1962). Here, the purported "agent", plaintiff national bank, is transacting dealings only between itself and its customers. There is no third party involved.

Control of the agent is another elementary factor in an agency relationship. *Smith* v. *Cities Service Oil Co.*, 346 F.2d 349 (7th Cir. 1965); *Manufacturers Casualty Insurance Co.* v. *Martin-Lebreton Insurance Agency*, 242 F.2d 951 (5th Cir.), *cert den.*, 355 U.S. 870 (1957); RESTATEMENT (SECOND) OF AGENCY §1 at 9 (1957). The customers here have no control whatsoever over First National's performance of its off-premises banking operations or over the monies they request from or deliver to the bank employees (R. 183-86).

Further, the primary obligation of the agent must be to act for the benefit of the principal. *Shultz* v. *Manufacturers & Traders Trust Co.*, 40 F. Supp. 675 (W.D. N.Y. 1941), *aff'd*, 128 F.2d 889 (2nd Cir.), *cert. den.*, 317 U.S. 674 (1942); RESTATEMENT (SECOND) OF AGENCY §1 (1957). Plaintiff national bank, the alleged agent in performing the off-premises banking operations, is not primarily obligated to act for the benefit of the customers.

Plaintiffs argue, however, that the contractual statement of agency only confirms a relationship that would exist in any event. In making this argument, plaintiffs do not point to any factual characteristics of an agency relationship existing between First National and its depositors. Instead, they rely solely upon cases dealing with a bank's

liability for funds received away from the bank by a bank employee *acting on his own volition.* In such cases, it is generally held that the bank employee is acting as agent of the person delivering him the money. Accordingly, the bank is not liable for such funds until they reach the bank.

There is a well-established exception to this rule if the bank *authorizes* its employees to receive the monies of depositors *away from the bank.* 5 MICHIE, BANKS & BANKING §14 at 46-47; *Nordin* v. *Eagle Rock State Bank,* 139 Cal. App. 584, 34 P.2d 490 (1934). Hence, if the bank employee accepts monies from the depositors off-premises pursuant to the direction and authorization of the bank, he is not considered to be acting as the agent for the depositors.

In the instant case, of course, First National's armored car teller receives the monies off-premises in the usual course of the bank's business and pursuant to the bank's express instructions. Certainly the above-stated exception is applicable here. First National is not receiving the monies off-premises as "agent" for its depositors under the general rule asserted by plaintiffs.

The record herein establishes that no agency relationship exists in law or fact between plaintiff national bank and its customers.[31] Indeed, the office of the Comptroller of the Currency has held in the past that the very factors involved here establish that no agency relationship is present and that the bank is accordingly branch banking by the armored car operations (R. 1466, 1472).

The fundamental purpose of the banking business is obtaining monies from customers for deposit and making monies available to the public. In enacting the McFadden

31. Further, as a matter of law, defendants at least were entitled to a trial resolving material disputes of fact and allowing further development of the national Comptroller's design in authorizing such contracts and the national bank's intent is acting upon such authority.

Act, Congress recognized that the power to perform those important banking services at a variety of locations is a significant competitive advantage.

Some thirty years after passage of the federal branching act, First National has established various places of performing its banking business away from the bank. It is there performing the mainstream banking functions with which the McFadden Act dealt. In short, as the Circuit Court expressly held, First National is doing by paper evasions that which Congress prohibited as branch banking.

D. First National Is Cashing Checks Off-Premises.

In addition to receiving deposits away from its main banking house, First National is cashing checks off-premises.

A major service of the armored car operations is the delivery of currency, including large payrolls, by First National to customers at their business premises. When a check is given to the bank employee in exchange for monies the transaction constitutes the cashing of checks away from the banking house.[32]

The District Court so found (A. 374).[33] This finding alone requires affirmance of the Court of Appeals' deci-

32. The bank utilizes a "debit slip" providing that the customer's account has been debited at the bank for the amount of the currency (A. 141). However, in many instances, no actual, funded account is debited. None exists. First National simply "debits" a fictitious, "wash-out" account (A. 210-211). These accounts *never* have any monies in them, and all transactions relating to such accounts are "paper" transactions.

33. It is stated in plaintiff national bank's brief in note 13, p. 25, that the issue of cashing checks off-premises is moot because this practice has been discontinued. There is no evidence in the record herein to support this statement and defendants have no way to confirm this is so. Furthermore, there is no prohibition in the District Court's ruling that would prevent the bank from

sion. The single function of cashing checks off-premises clearly constitutes branch banking under the express terms of section 36(f). *Jackson* v. *First National Bank of Valdosta*, 246 F. Supp. 134 (M.D. Ga. 1965).

The District Court erred in ignoring its own finding of fact. There is no justification either in section 36(f) or in proper judicial action for eliminating a crucial finding in order to sustain a decision. If part of First National's questioned operations involved check cashing, it was unquestionably engaged in branch banking.

### E. If the Comptroller's Construction of Section 36(f) Were Sustained, National Banks Would Be Able to Establish and Maintain Branch Banks Irrespective of State Branching Law.

The statutes of the fifty states relating to branch banking vary considerably. They reflect the individual needs of each state resulting from different population patterns and divergent economies. It was in recognition of this fact that Congress applied state branching law to national banks rather than enacting a uniform federal branching law that would have inevitably compelled all states to permit branching in order to maintain competitive equality.

Under the Comptroller's approach to section 36, national banks would be able to establish branch banks in which the complete business of banking could be performed, irrespective of state branching law. At least arguably, the banks could establish facilities at which the customers could open accounts, obtain trust department services, purchase banking paper, purchase and redeem

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resuming this practice in the future. Hence, the question is not moot, particularly in view of plaintiff's contention that the District Court's findings should be reinstated and the fact that defendant state comptroller has been enjoined, in effect, from interfering with plaintiff's off-premises bank operations.

savings bonds, obtain change, and make loan payments. This is so because none of these banking transactions are expressly included in the section 36(f) definition of a branch. At the same facility, by employing the contractual devices authorized by the Comptroller herein, the national bank could receive deposits, cash checks, and make loans at the branch. Unlimited branching would thus be existent.

National banks should not be permitted to evade the federal branching laws by such contractual devices. If the terms and policy of section 36 can be so easily negated, obviously national banks will be able to perform complete branching operations, as well as the limited but important branching operations here. As in the instant case, this will be done in violation of state law to the ensuing competitive disadvantage of state banks. Alternatively, states will be coerced into permitting state banks to branch bank in order to effectively compete with national banks.

There has already been a considerable economic impact upon defendant state banks resulting from the off-premises banking services of First National and the competitive inequality created thereby. First National obtained a number of new, large commercial accounts as a direct result of its off-premises services (A. 383). It immediately began to handle "well over" one million dollars a week through the armored car (R. 55-56). At the same time, the Hillsboro Bank, an older state bank located together with First National in Plant City, failed to acquire the new business which it had anticipated would result from construction of a new and modern bank building (R. 667-68).

It is, therefore, no exaggeration to say that adoption of the Comptroller's construction of section 36 would spell the end of the dual banking system in those states pro-

hibiting or restricting branch banking. This is precisely what Congress sought to avoid in enacting the McFadden Act.

Defendants respectfully submit that First National is engaged in branch banking according to the terms of §36 and as contemplated by Congress. It is receiving deposits and cashing checks away from its main banking house. Florida law does not authorize state banks to perform such banking operations away from the bank premises. FLA. STAT. Ch. 659.[34] Accordingly, First National is branch banking in contravention of federal law.

**II. The Court of Appeals Correctly Applied Federal and State Branching Law in Finding That First National's Off-Premises Banking Operations Constitute Illegal Branch Banking. In Any Event, However, Final Judgment Cannot Be Entered for Plaintiffs on the Basis of the Record in This Case.**

The major thrust of the briefs supporting the Comptroller of Currency is the contention that the Court of Appeals held that state law alone controls the issue of what off-premises activities constitute "branching." It is asserted that the decision below thereby permits states to potentially prohibit "all" off-premises activities of national banks as branch banking. Plaintiffs express great concern for the orderly administration of national banks as a result of this alleged holding. Further, they cry alarm at the arbitrariness of states and state banking authorities as to national banks' activities.

It must be recognized at the outset that this contention of plaintiffs is unrelated to the central question here of whether First National's off-premises banking operations

34. As will be shown in Point II of this brief at pages 47-49 Florida law specifically prohibits state banks from providing such off-premises banking services.

constitute branch banking within the meaning of the McFadden Act. *In this case,* it makes no difference whether or not section 36(f) provides the sole, exclusive federal definition of a branch bank. This is so because, as demonstrated in the first portion of this brief, the simple fact is that First National's off-premises operations here do involve the receipt of deposits and cashing of checks for customers at places away from the main banking house. Consequently, it is performing those mainstream banking activities defined as branch banking under the express terms of 12 U.S.C. §36(f).

For this reason alone, the judgment of the Court of Appeals is correct and should be affirmed.

Defendants do not seek a death-lock on all off-premises banking activities. As noted, this case only involves the off-premises performance by national banks of the banking functions of receiving deposits and paying checks. Congress clearly intended these off-premises banking services, no matter how performed, to be governed by state branching law. Florida law does not authorize state banks to perform these banking services off-premises. However, plaintiffs seek to avoid the statutory provisions and intent by use of contractual artifice. Defendants only seek to assure, in turn, that the basic Florida banking laws cannot be frustrated by such devices and that national banks do not gain undue competitive advantage.

Defendants believe that the true holding of the Court of Appeals is that federal law, and not state law, initially controls the question of what activities of national banks are "branching" for purposes of the federal branch banking statute. State branching law is applicable only to those off-premises banking activities of national banks that come within the terms of section 36(f).

If the language of the Court of Appeals lacks precision, as urged by plaintiffs, it can now be clarified. This can be done without disturbing the judgment rendered by the Court of Appeals for defendants.

On the other hand, final judgment can in no event be rendered for plaintiffs in view of the state of the record of this cause. There are a number of issues of fact that must be passed upon if the judgment of the Court of Appeals for defendants is not sustained.

### A. The Court of Appeals Correctly Applied Federal and State Branching Law in Finding That First National's Off-Premises Banking Operations Constitute Illegal Branch Banking.

The decision of the Court of Appeals is to some extent couched in broad, and possibly even vague, language. Defendants submit, however, that a fair reading of the decision below, when considered in the context of this case and particularly in the context of the District Court's decision, reveals that the Court of Appeals did not render the far-reaching decision asserted by plaintiffs.

The District Court held that section 36(f) constitutes the exclusive federal definition of a branch (A. 371). It then concluded that the contracts used by First National in its off-premises banking transactions prevented the activities from amounting to the receipt of deposits or the cashing of checks within the provisions of section 36(f) (A. 371). The District Court further held the off-premises banking activities of First National do not violate Florida law (A. 376-77).

Each of these holdings was properly overruled by the Court of Appeals.

1. *The Court of Appeals properly held that federal law governs the threshold determination of what off-premises banking activities of national banks constitute branching.*

The Court of Appeals held that section 36(f) is not an exclusive definition of a branch. It ruled instead that section 36(f) provides a broad, functional definition of a branch that initially determines whether an off-premises activity of a national bank falls within the McFadden Act. If this federal test is met, then state branching law becomes applicable to the activity. That this is the true rationale of the decision below is demonstrated by the Court's reliance upon the reasoning of Judge Lindberg in *State Chartered Banks* v. *Peoples National Bank,* 291 F. Supp. 180 (D.C. Wash. 1966).

In *State Chartered Banks,* the District Court stated[35] that section 36(f) determines "*prima facie* if the supplementing state branching law should come into play." *Id.* at 194-95. The Court declared the test of "branchness" to be two-fold:

> "(1) Does the facility fit the broad functional definition laid down by Congress in Section 36(f) and if so, (2) Does the state law add any more refinements to the definition?" *Id.* at 195.

It was stressed that state law comes into play *only after* a determination has been made that the off-premises operation constitutes a branch under section 36(f). As the District Court summed it up, if the off-premises operation falls within the broad, functional definition of a branch in section 36(f), "we have passed over the threshold of federal law and must then turn to state law for a full consideration of this facility's character." *Id.* at 196.

35. The following analysis by Judge Lindberg was quoted in its entirety by the Court of Appeals below (A. 401-06).

The Court of Appeals in this case expressly stated that it subscribed to Judge Lindberg's analysis "without hesitation." (A. 406). Defendants believe that, by so doing, the Court of Appeals made it plain that the question of what constitutes branching by national banks is initially a federal question to be determined solely by the functional provisions of section 36(f).[36] If this federal test is satisfied, then state branching law becomes applicable to the off-premises activity in question.

The Court's construction of section 36(f) as a broad, functional definition of a branch is consistent with the language and legislative history of the McFadden Act, as well as decisions of other courts.

In section 36(f), Congress provided only that the term "branch" *"shall be held to include"* any bank, office, agency, additional office, or place of business at which "deposits are received, or checks paid, or money lent." The United States Supreme Court has held that the term "include" is "not one of an all embracing definition, but connotes simply an *illustrative application of the general principle.*" *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). Hence, plaintiffs' contention that section 36(f) constitutes a narrow, all-inclusive definition of a "branch" is contrary to the precise terms of that definition.

Further, the only legislative history that expressly deals with this point indicates that Congress intended section 36(f) to be an illustrative, rather than restrictive, definition of branching. Representative McFadden described the definitional section of the act as providing that:

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36. The only Court which has, to defendants' knowledge, considered the decision below so construed it. *Jackson* v. *First National Bank of Cornelia*, 292 F. Supp. 156 (N.D. Ga. 1968).

> *"any place* outside of or away from the main office *where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office is a branch."* 68 CONG. REC. 5816 (1927).

Such a contemporaneous construction of this section by the very sponsor of the branching bill should be afforded considerable weight.

The Comptroller argues, however, that it would be "anomalous" to suggest that the meaning of the term "branch" should not be uniform within section 36 (C.B. 10). Obviously there must be uniformity as to what off-premises activities of national banks constitute a branch for purposes of this section. This uniformity is provided under the test set forth in *State Chartered Banks, supra,* and expressly adopted by the Court of Appeals herein. Thus, only those banking activities of national banks that come within the terms of section 36(f) constitute a branch. This is the case in any state of the Union. The varying state branching laws govern activities of national banks *only* if they meet the uniform test of branching in section 36(f).

The Comptroller further argues that Congress must have intended section 36(f) to be an "exclusive" definition of a branch because it did not expressly incorporate state branching laws therein.[37] Similar arguments have been rejected by this Court as well as the Court of Appeals for the District of Columbia.

In *Nuesse* v. *Camp,* 385 F.2d 694 (D.C. Cir. 1967), the question was what, for purposes of the National Bank Act,

37. The Court of Appeals' construction of section 36(f) is in no way inconsistent with decisions from other circuits. The question of whether that section is a partial or an exclusive definition of a "branch" was not raised or ruled upon in the cases relied on by plaintiffs as conflicting with the decision of the Fifth Circuit here.

is a "state bank" as defined in 12 U.S.C. §36(h). The District Court held there that "only the construction of a federal statute is at issue." The Court of Appeals reversed. It held that, even though section 36(h) did not expressly adopt state law, it is part of a federal statute reflecting a policy of coordination of state and federal law. The Court concluded that "it would be unsound to assert that the proper interpretation of section 36(h) is independent of state policy and legislation." *Id.* at 705.

Similarly, in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), the Comptroller of the Currency argued that section 36(c)(2) [dealing with branching beyond city limits] expressly incorporated state branching restrictions whereas section 36(c)(1) [dealing with branching inside city limits] did not. This allegedly showed a Congressional intent that state branching restrictions did not bind national banks under section 36(c)(1).

The Supreme Court held, however, that the restriction, regardless of how it was designated, was an integral part of state branching policy absorbed under section 36(c). In so holding, the Court observed that it "is a strange argument that permits one to pick and choose what portion of the law binds him." 385 U.S. at 261. Therefore, the Comptroller's argument was rejected in *Walker Bank* for reasons equally applicable herein.

2. *The Court of Appeals correctly found that the off-premises banking activities of First National constitute branching as defined in section 36(f).*

In the instant case, the Court of Appeals determined that First National is receiving deposits and/or cashing checks, within the meaning of section 36(f), at agencies or places of business away from its main banking house. It held, contrary to the District Court, that the contracts of

First National could not be used to avoid the effect of section 36.

Plaintiffs assert that the Court of Appeals made no inquiry as to whether First National was branching as defined in section 36(f) but instead relied entirely upon state law[38] (C.B. 7-8). The Comptroller quotes the Court as holding "indefensible" any inquiry as to whether First National's off-premises banking operations fall within section 36(f), relying instead solely on state law (C.B. 7-8). However, the Court did not term this inquiry as indefensible, but rather plaintiffs' contention that First National was not branch banking within the terms of section 36(f) because of its "agency" and "deposits" agreements (A. 400). Characterizing these contracts as "paper evasions," the Court of Appeals refused to "aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language." (A. 406-07).

The Court of Appeals concluded that the question of whether First National is receiving deposits and/or cashing checks off-premises is to be resolved in terms of banking function (A. 404-05). Finding that the off-premises banking activities of First National met the federal test of branching, the Court then turned to a consideration of the pertinent Florida statute.

3. *The Court of Appeals correctly held that Florida law prohibits the off-premises banking operations of First National.*

Under Florida Statute Section 659.06, all the business of a bank is required to be performed at its banking house

38. Plaintiff national bank goes even further, asserting that the Court of Appeals left intact the District Court's finding that First National was not receiving deposits or cashing checks at its off-premises banking operations (B.B. 6, 25).

and authorized drive-in or walk-up facilities. A bank with drive-in or walk-up facility is authorized only if it is located on the same property as the main banking house or on property contiguous thereto. FLA. STAT. §659.06(2). Thus, the State of Florida has the clearest kind of branch banking statute. It simply provides there can be no branch banking.

The Comptroller asserts, however, that Florida Statute Section 659.06 is "unclear." (C.B. 8). He contends that the Court of Appeals therefore arbitrarily adopted the ruling of defendant Comptroller of the State of Florida that First National's off-premises activities are prohibited under this statute.

Contrary to the Comptroller's assertion, the Court of Appeals specifically examined the statutory language in question and made its own interpretation thereof (A. 408-09). The Court concluded that the statute was "uncomplicated, unhedged, and unmodified." (A. 408-09).

Furthermore, the Court did not accept as dispositive the ruling of defendant state comptroller. The Court merely observed that it should follow such a ruling "when, as here, it appears consistent with the policy of the state statutes." (A. 408).

Thus, federal courts can always protect national banks against arbitrary or unjustified branch banking rulings of state banking officials by evaluating the state law in question, just as the Court of Appeals did in this case.

The Comptroller also attacks the finding of the Court of Appeals that the off-premises banking activities of First National violate Florida Statute Section 659.06. It is first asserted that the phrase "one place of doing business" is subject to a variety of interpretations (C.B. 36). Regardless of whether or not this is true, it is irrelevant in this

case. Both the Comptroller and plaintiff national bank have admitted at all times herein that the off-premises activities of First National constitute the business of banking (A. 20, 160-61, 184).

It is further contended that there is a "critical ambiguity" built into subsection (2) of Florida Statutes 659.06, prohibiting the operation of off-premises drive-in or walk-up facilities. The Comptroller asserts that Florida law only prohibits those off-premises drive-in or walk-up facilities that provide tellers to serve customers, and that there is an unresolved question of fact in this case as to whether First National provides such a "teller" to serve customers at its off-premises facilities.

The Comptroller misconceives Florida law. Under section 659.06(2), banks are permitted to maintain drive-in or walk-up facilities, which may or may not provide tellers to serve customers, if the facilities are located on the bank property or contiguous thereto. Under this section, both state and national banks have for years provided *unattended* night depositories. However, "any drive-in or walk-up facility" that is not so located is prohibited. Further, the point is immaterial in this case because First National does in fact provide a teller on the armored car to serve customers off-premises (A. 57, 384, 389).

One last point must be mentioned in this connection. Defendants believe that the Court of Appeals properly held that the off-premises banking operations of First National are performed in direct contravention of Florida Statute Section 659.06. However, for purposes of the federal branch banking act, it is irrelevant whether the branching activities of First National *violate* Florida law. Under section 36(c), the pertinent factor is whether the branching activities are *authorized* by state law. It has never

been suggested in this cause that the off-premises banking activities of First National are authorized under Florida law.

B. If the Judgment Rendered by the Court of Appeals for Defendants Is Not Sustained, Remand of This Cause Is Required in Order to Resolve Material Issues of Fact.

Plaintiffs' complaints (A. 15-24, 152-61) and defendants' answers thereto (A. 28-47) essentially presented the following issues:

(1) Whether the armored car and depository operations of First National constitute branch banking in violation of 12 U.S.C. §36;

(2) Whether these operations constitute the transaction of banking business at more than one location in violation of 12 U.S.C. §81;

(3) Whether such operations are authorized as incidental powers of national banks under 12 U.S.C. §24 (seventh) so that federal law is paramount over Florida law; and

(4) Whether the operations are performed by First National in violation of Florida Statute Section 659.06.

The Court of Appeals overruled at least three holdings of the District Court as to these issues. Contrary to the District Court, the Court of Appeals held that section 36(f) was not an exclusive definition of a branch and that the off-premises banking activities of First National constitute branch banking within the meaning of section 36(f). It also overruled the District Court's holding that First National's off-premises banking operations do not violate Florida law. The question of whether First National's armored bank car and shopping center depository opera-

tions are authorized incidental powers of national banks under section 24 (seventh) was never passed upon by either court (A. 376).

The holdings of both the District Court and the Circuit Court turned on rulings on law rather than findings of fact. The Court of Appeals noted the factual disputes herein but held that they were not relevant "in light of our decision." (A. 396, fn. 4). Similarly, the Court of Appeals never reached the "section 24" issue because it found the activities in question to be illegal branch banking. Thus, both courts declined, in different ways, to resolve the factual disputes present in this case.

As previously noted, the judgment below for the defendants can be sustained if the Court finds, as did the Court of Appeals, that First National cannot use contractual devices to evade and frustrate the federal branching laws. This is true regardless of whether the language of the decision below is clarified or modified. On the other hand, final judgment cannot be entered here for plaintiffs because there are material issues of fact that would have to first be resolved.

For instance, the District Court held that the "deposit" and "agency" contracts of First National were "unambiguous." It therefore refused to consider parol evidence on matters such as the contractual intent of First National and its customers and, particularly, whether the contracts were intended to evade federal branching law. Issues of fact were created and error assigned. The Court of Appeals should pass on this matter.

Again, the District Court found, from a sampling of five or so bank customers, that First National's off-premises banking operations are performed in "substantial" compliance with the Comptroller's rulings. Yet there were

disputes of fact as to the method by which the off-premises banking operations were actually performed. Further, the District Court's own finding that First National was at times cashing checks for customers off-premises was at least enough to create a question of fact as to whether the activity "substantially" complies with the Comptroller's rulings.

Finally, even if the off-premises activities are not branch banking, a question still remains under the pleadings in this case as to whether such activities are authorized to national banks as implied powers granted under 12 U.S.C. §24 (seventh). This point turns on the question of whether such activities are "necessary" to properly carry out the express powers of national banks. In order to dispose of this case in favor of plaintiffs, this issue must be resolved.

C. The Holding of the Court of Appeals That Section 36(f) Provides the Initial Determination of What Is a Branch, Thereby Establishing the Point at Which State Branching Law Comes into Play, Constitutes a Workable and Practical Rule Which Is Consistent with the Policy of the McFadden Act.

The Court of Appeals properly held that section 36(f) provides the broad, functional definition of a branch which determines if state branching law should come into play. This test is consistent with the legislative history and statutory language of the federal branching act. Thus, it presents a rule of mutual respect and accommodation between state and federal banking authorities while also providing a test of branching to be applied uniformly to all national banks throughout the country.

The test followed by the Court of Appeals precludes arbitrary state action in connection with off-premises ac-

tivities of national banks. Under this approach, the federal courts have the final say as to whether a particular activity is a "branch" within the terms of section 36(f). If it is recognized, whether by state and federal banking authorities or by state and federal courts, that the *initial* test of a branch of national banks is whether the activity falls within the terms of section 36(f), none of the potential consequences suggested by plaintiffs can follow.

That the states do not in fact seek the power to arbitrarily prohibit "all" off-premises banking operations of national banks is clearly indicated. The instant case involves only those particular banking functions that are designated in the McFadden Act as branch banking. Similarly, not one instance has been established where a state has treated any off-premises operation *other than one involving the receipt of deposits, the cashing of checks, or the making of loans* as a branch. Yet an amici curiae brief of twenty-two national banks, doing business in seventeen different states, as well as the brief of the Comptroller of the Currency of the United States, has been filed here.

Further, the prediction that states will prohibit arbitrarily "all" off-premises activities of national banks as "branches" ignores the fact that *such activities would be equally prohibited to state banks.* Consequently, national banks need not fear unfriendly or discriminatory treatment at the hands of states.

On the other hand, if the Congressional policy of competitive equality in branch banking is to have any significance or import, there must also be concern with arbitrary rulings by the Comptroller of the Currency that confer the competitive advantage upon national banks. This must be of particular concern when the ruling in question is

made by a Comptroller of the Currency who candidly states his disagreement with Congressional branching policy.[39] Recognition of section 36(f) as a broad, functional definition of a "branch" provides the requisite protection in this connection, whereas the fixed, technical definition urged by the Comptroller could only cause erosion of the principle of competitive equality.

The instant case presents a situation of arbitrary action by the national Comptroller, not by the State of Florida. The Comptroller of the Currency has permitted national banks to perform branching activities by contractual device and artifice, even though state law prohibits branch banking by state banks. If national banks can use such subterfuges to evade branching prohibitions of the states, the entire federal branching act and policy is frustrated and negated.

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39. In 1963, Comptroller Saxon declared that "the branching powers of National Banks should, in my judgment, not be limited according to those policies which the individual States find appropriate to meet their local needs through State-chartered banks." Saxon, *Branching Powers & the Dual Banking System*, 101 COMPT. CURRENCY ANN. REP. 316, 318 (1963). In this same year, Comptroller Saxon ruled that off-premises banking operations such as those performed here did not constitute branch banking.

## CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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